IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 11TH JANUARY 2007 / 21ST PAUSHA 1928

OP.No. 34859 of 2002(Y)

PETITIONER:
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1. KOTHAMANGALAM AGGREGATES,
PRE-STRESSED CONCRETE INDUSTRIES POLE CASTING YARD, KOTHAMANGALAM REP.BY ITS MANAGING PARTNER C.P.DAVID.

2. C.P.DAVID S/O. POULOSE, AGED 59 YEARS,
AMANAGING PARTNER, KOTHAMANGALAM AGGREGATES.

BY ADV. SRI.M.RAMESH CHANDER

RESPONDENTS:
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1. THE KERALA STATE ELECTRICITY BOARD,
VYDYUTHI BHAVAN, TRIVANDRUM REP.BY ITS SECRETARY.

2. THE CHAIRMAN, KERALA STATE ELECTRICITY BOARD, VYDYUTHI BHAVAN, PATTOM, TRIVANDRUM.

3. THE CHIEF ENGINEER (CIVIL IELA) KERALA STATE ELECTRICITY BOARD, PATTOM, TRIVANDRUM.

BY ADV. SRI.P.SANTHALINGAM, SC, KSEB
SRI.C.K.KARUNAKARAN, SC FOR KSEB

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 08/01/2007, THE COURT ON 11/01/2007 DELIVERED THE FOLLOWING:

APPENDIX

O.P. MP/34859/2002

PETITIONER'S EXHIBITS:

EXT.P1:	TRUE COPY OF JUDGMENT IN O.P. 27592 OF 2001 DATED 18.9.2001
EXT.P2:	TRUE COPY OF THE REPRESENTATION DATED 30.4.2002
EXT.P3:	TRUE COPY OF THE REPRESENTATION DATED 8.5.2002
EXT.P4:	TRUE COPY OF THE REPRESENTATION DATED 14.5.2002
EXT.P5:	TRUE COPY OF THE REPRESENTATION DATED 22.5.2002
EXT.P6:	TRUE COPY OF THE REPRESENTATION DATED 2.7.2002
EXT.P7:	TRUE COPY OF THE BILL GIVEN BY THE PETITIONER TO THE DEPARTMENT DATED 16.11.2002

S.SIRI JAGAN, J.

O.P . NO.34859 OF 2002

Dated this the 11th day of January, 2007

JUDGMENT

This Writ Petition relates to the disputes between the petitioners and the Kerala State Electricity Board regarding the question of imposition of penalty for delayed supply of concrete poles. The 1st petitioner is a partnership firm of which the 2nd petitioner is the Managing Partner, who undertook a contract for manufacture and supply of pre-stressed concrete poles to the electrical circles of Trichur and Thodupuzha. The petitioners are now challenging the penalty imposed on them by Ext.P7 order by the 1st respondent Electricity Board for delayed supply of concrete poles for which there is a specific provision in the contract entered into between the parties. The petitioners submit that the delay occurred only on account of the fact that large amounts payable by the respondent for poles already supplied became in arrears and because of these huge pending arrears, the petitioners did not have enough capital to manufacture the poles and supply the same to the respondents. Therefore, the delay is directly attributable to the Electricity Board itself and they cannot take advantage of their own default to impose penalty on the petitioner is the submission of the petitioners. Accordingly, the petitioners seek quashing of Ext.P7 bill by which penalties of Rs.67964.40 and Rs.55826.87 have been imposed on the petitioner for delayed supply of concrete poles in respect of the 'Trichur and Thodupuzha Sections for the quarters 17.6.2002 to 16.9.2002 and 6.6.2002 to 8.9.2002 respectively.

Their contention is that the arrears due amounting to Rs.27 lakhs was paid only on 26.7.2002 and therefore they could start the production for the particular quarter only after 26.7.2002 and therefore the delay cannot be attributed to them.

2. A counter affidavit has been filed by the respondents, in which they candidly admitted that the petitioners have been meeting the target and supplying the poles as required. They also candidly admit that they could not meet the payment scheduled in time only because of paucity of funds. But they would definitely say that they have made substantial payments in respect of the pending bills so as to enable the petitioners to manufacture poles for the above said quarters sufficiently early and therefore the petitioners cannot now complain that the delay in supply occurred only on account of delay in payment of the pending bills. They would also specifically rely on Ext.P1 judgment of this court, in which, this court only said that till payment of reasonable amount to the petitioner, no penalty should be imposed on which judgment was pronounced in similar circumstances for earlier period. In the above circumstances, respondents would argue for sustaining the penalty imposed by Ext.P7 Bill.

3. I have considered the rival contentions in detail.

4. I am of the opinion that as far as parties to the contract are concerned there should be mutuality not only in performance but also in the case of imposition of penalty for delay in performance meaning thereby that when one party delayed payment of the existing bills it cannot impose penalty on the other party for non-supply of the material for subsequent period in

time. Taking into account the fact that the respondent is a statutory body which supplies electricity to the whole state, I am inclined to take a lenient view but that must be commensurate with their delay in payment also. In the counter affidavit, they have given the details of payment of the pending bills prior to the quarters in question as follows:-

Bill Date	Amount	Date of payment	Delay occurred over and above the normal due date
19-2-02	3,16,965/-	6-6-02	78 days
1-4-02	6,44,139/-	26-7-02	87 days
22-4-02	3,95,152/-	18-7-02	66 days
25-4-02	7,38,298/-	26-7-02	71 days
17-5-02	2,74,964/-	26-7-02	39 days
11-5-02	4,21,313/-	26-7-02	39 days

So admittedly they have committed delay in payment of the pending bills for the days mentioned in the last column of the above table. I am of the opinion that for the purpose of imposition of penalty on the petitioner for delayed supply of poles, the period of delay in payment should also be taken into account. For the purpose of convenience, I take the average delay as 70 days. Accordingly, the respondents are directed to rework the penalty after excluding 70 days from the target period of supply as per the contract by the petitioners in respect of the Trichur and Thodupuzha sections for the quarters 17.6.2002 to 16.9.2002 and 6.6.2002 to 8.9.2002 after giving corresponding time on the basis of the above delay. The respondents

would rework the penalty and pass fresh orders within a period of two months from the date of copy of this Judgment. For this purpose, I quash Ext.P7. The Writ Petition is disposed of as above.

(**S.SIRI JAGAN, JUDGE)**

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